IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

TUESDAY, THE 16TH JANUARY 2007 / 26TH PAUSHA 1928

CRL.A.No. 1457 of 2006()

SC.494/2001 of ADDL.SESSIONS COURT-TRIAL OF ABKARI ACT CASES,NEYYATTINKARA

APPELLANT: ACCUSED

BABY NADAR, S/O. VARGHESE NADAR,
C.NO.322, CENTRAL PRISON, POOJAPURA,
THIRUVANANTHAPURAM-695 012.

BY ADV. SRI.PRADEEP K.P.(STATE BRIEF)

RESPONDENTS: COMPLAINANT

THE STATE OF KERALA, REPRESENTED BY
A PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI.K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 16/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl. A. No. 1457 of 2006

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Dated, this the 16th day of January 2007

JUDGMENT

In this appeal preferred from the Central Prison, Thiruvananthapuram, the appellant who is the accused in S.C. No. 494/01 on the file of the Addl. Sessions Judge for the Trial of Abkari Act Cases, Neyyattinkara, challenges the conviction entered and the sentence passed against the appellant for an offence punishable under Sec. 58 of the Abkari Act.

2. The case of the prosecution is that on 1-5-1998 at about 1 p.m. on the kuttappu-Amboori public road in front of Amboori Village Office at Kovilloor Desom the accused was found in possession of 10 litres of illicit arrack in a jerry can and that the accused has thereby committed an offence punishable under Sec. 58 of the Abkari Act.

3. On the accused pleading not guilty to the charge framed against him by the court below for the aforementioned

offences, the prosecution was permitted to adduce evidence in support of its case. The prosecution examined 6 witnesses as P.Ws 1 to 6 and got marked 6 documents as Exts. P1 to P6 and one material object as MO1.

4. After the close of the prosecution evidence the accused was questioned under Sec. 313 (1)(b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence.

5. Since the trial judge did not consider this a fit case for recording an order of acquittal under Sec. 232 Cr.P.C. the accused was called upon to enter on his defence and to adduce any evidence which he might have in support thereof. The accused examined the Village Officer, Arimboor Village as D.W.1.

6. The learned Addl. Sessions Judge, after trial, as per judgment dated 24-5-2006 found the appellant guilty of the offence alleged against him and sentenced him to undergo rigorous imprisonment for two years and to pay fine of Rs. 1,00,000/- and on default to pay fine, to suffer rigorous imprisonment for three months. It is the said judgment which is

assailed in this appeal.

7. I heard Advocate Sri. Pradeep K.P., the learned counsel who defended the appellant on State Brief and Adv. Sri. Sivakumar, the learned Public Prosecutor, who defended the State.

8. The only point which arises for consideration in this appeal is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not ?

THE POINT:

9. P.W.1 was the Excise Preventive Officer of Amaravila Excise Range. He detected the offence. He proved Ext.P1 mahazar . MO1 jerry can was marked through him. P.W2 is none other than the son of the accused who was examined as an independent witness. He not only turned hostile to the prosecution but even went to the extent of denying his signature in Ext.P1 mahazar. P.W.3 was the Excise Preventive Officer who had accompanied P.W.1. He is also a signatory to Ext.P1 mahazar and identified MO1 jerry can. P.W.4 is the Excise inspector who recorded Ext.P2 crime and occurrence report and registered the Crime as C.R.15/98 of Amaravila Excise Range. Ext.P3 remand report and P4 thondi list were marked through

him. P.W.5 was the Excise Inspector who investigated the case. P.W.6 was the thondi section clerk attached to the committal Magistrate. He proved Ext.P6 relevant entry in the thondi register.

10. After hearing both sides and after bestowing my anxious consideration to the oral and documentary evidence, I am not satisfied that the prosecution has succeeded in bringing home the guilt of the accused beyond reasonable doubt.

11. Even if the evidence of P.Ws 1 and 3 regarding the arrest, search and seizure could be relied on, there is no connecting link evidence to conclusively establish the guilt of the accused. Going by Ext.P1 contemporaneous mahazar prepared by P.w.1 from the scene of detection itself P.W.1 had affixed a label on the jerry can and had obtained the signature of the accused and the witnesses on the said label. But P.W.1 had to confess that the label on MO1 jerry can does not contain the signature of the accused. When confronted with this infirmity he went to the extent of saying that the recitals in Ext.P1 mahazar to the contrary are not true. It cannot therefore be conclusively concluded that MO1 jerry can produced in court was the one

allegedly carried by the accused on the date of detection. The jerry can which was allegedly seized from the possession of the accused under Ext.P1 mahazar was produced before the court on 1-5-1998 itself as revealed by Ext.P4 thondi list. There is an endorsement by the Magistrate on Ext.P4 thondi list as follows:-

> "After taking the sample the MOs may be kept in the police station" .

12. This endorsement is made on 2-5-1998. But there is nothing on record to show that the above direction of the Magistrate was complied with. Ext.P6 is the relevant entry in the thondi register maintained by the committal Magistrate. The said entry also shows that on 1-5-1998 a 10 litre jerry can full of arrack was received in court as T. No. 96/98. The aforementioned endorsement dated 2-5-1998 of the Magistrate is re-produced on the right hand side of Ext.P6. In the middle of that page there is an endorsement as follows:

"സാംപിൾ എടുത്തു"

This endorsement is signed by P.W.6 and is dated 1-7-1998. P.W.6 is the thondi section clerk who claims to have taken

sample in this case. She stated that Ext.P6 contains her signature below the endorsement referred to above. The above endorsement in malayalam means that the sample was taken possession of . If P.W.6 herself had taken the sample in this case there was no need for her to take possession of the sample on 1-7-1998. The prosecution has no case that after taking the sample from the jerry can it was returned to be kept in the police station. If as a matter of fact the property was returned, then necessarily an endorsement to that effect ought to have been made in the property register. But Ext.P6 does not show any such endorsement . P.W.6 has not given the date on which she had taken the sample. Nor has she deposed about the manner of sampling or whether she had despatched the sample to the Chemical Examiner's laboratory after packing and sealing the same. All that she says is that she had taken the sample. Being the thondy section clerk (property clerk), she would have handled innumerable items of properties and would have taken samples from several bulk quantities of contraband liquors. there is no particular reason for her to remember the sampling in this case. The ipsi dixit of P.W.5

cannot be the final word on this aspect since there is no contemporaneous written record maintained by the committal Magistrate showing that the sampling was done in this case on a particular day or was done by P.W.6 or was dispatched by P.W.6 after packing and sealing the same. If we go by the endorsement on Ext.P6, as mentioned earlier, there was no occasion for P.W. 6 to take over the sample on 1-7-1998 and the does not make any sense if P.W.6 was the member of the staff who had taken the sample pursuant to the directions of the Magistrate. Ext.P5 report of analysis no doubt refers to a letter dated 1-7-1998 from the committal Magistrate received along with the sample containing 150 ml. of colourless liquid but Ext.P5 does not indicate the date on which the sample in this case was taken or the person who had taken the sample. Ext.P5 only proves that the sample received thereunder on analysis was found to contain 37.03 percent by volume of Ethyl Alcohol.

13. Prosecution can succeed only if it is able to prove that the sample drawn from the bulk quantity of the alleged contraband liquor said to have been possessed by the accused and which had changed several hands, was dispatched in a

tamper proof condition to the chemical examiner and the same sample, on analysis, was found to contain Ethyl Alcochol. There is no contemporaneous record proved in the case to show that it was P.W.6 who had taken the sample in this case. Even if P.W.6 had taken the sample, it is not shown that the sample taken by P.W.6 had been despatched to the chemical examiner in a tamper proof condition particularly when it must have changed several hands. It was initially handled by P.W.6 If she is to be believed the sample was thereafter handled by an Excise Guard referred to Ext.P5 certificate. It must have thereafter been handled by the chemical examiner concerned. Therefore, unless the prosecution is able to show that the sample which was analysed by the chemical examiner was the very same sample which was drawn from the contraband liquor allegedly seized from the accused, no conviction can safely be recorded against the accused. (See The State of Rajasthan v. Daulat Ram - Vide AIR 1980 SC 1314 and Valsala v. State of Kerala - 1993 (2) KLT 550).

14. Even on the facts alleged by the prosecution evidence, at best, the offence which would have been attracted was

one either punishable under Sec. 8(2) of the Abkari Act or one punishable under Sec. 55(a) of the Abkari Act. An offence punishable under Sec. 58 of the Abkari Act is neither attracted nor proved in this case. For this reason also the conviction recorded by the court below cannot be sustained.

15. In the result, the conviction entered and the sentence passed against the appellant are set aside and the appellant is found not guilty of the offence punishable under Sec. 58 of the Abkari Act and is acquitted thereunder. He is set at liberty. He shall be released from prison forthwith unless his continued detention is found necessary in connection with any other case.

16. This Criminal Appeal is allowed as above.

17. Before parting with this case I have an important duty to perform. This Court has come across various cases involving prosecution under the Abkari Act. Invariably in most of the cases it has been noticed that there is no contemporaneous record maintained in any of the court of the committal Magistrate regarding the process of sampling. Ordinarily, it is the thondi section clerk who is entrusted with the duty of receiving the material objects and dealing with the same. It should be

discernible from the records maintained by the Magistrate that there was a direction by the Magistrate to take sample and indicating the quantity to be taken. Where such directions are carried out by the thondi section clerk, it should be discernible from the records maintained in the court. Such records should reveal the actual act of sampling and the packing and sealing of the sample and the despatch of the sample to the chemical examiner's laboratory after affixing the seal thereon and the separate despatch of the specimen seal to the chemical examiner's laboratory enabling the laboratory to verify and receive the sample after ascertaining whether the seal on the packet and the specimen seal separately received tallied and also after verifying whether the seal on the packet was intact. The prosecution should get the copy of the forwarding note or requisition for chemical analysis marked during trial. The prosecution should also be able to get marked during trial the office copy of the covering letter of the Magistrate while despatching the sample. In case there are no contemporaneous records regarding the sampling process the prosecution should be able to cite the thondi section clerk

concerned so that the prosecution may not fail due to want of link evidence, as in this case. In a case where the bulk quantity of contraband substance cannot be retained in the court due to paucity of space or due to fire hazard it is certainly open to the Magistrate to return the bulk quantity after taking sample therefrom to the investigating officer for safe custody. While doing so, there should be records evidencing the directions issued in that behalf and the compliance of the same. In this case even though the Magistrate had directed to return material object after taking sample therefrom, there is nothing to indicate that the material object was in fact returned. If the material object had been returned as directed, there should be contemporaneous records maintained by the Magistrate to indicate the member of the staff who had complied with the direction. In a case where the material objects are returned to the investigating officer there should be a clear direction while returning the same to produce the same before court as and when required. In such cases, there should be clear written direction issued by the Magistrate or by the trial court calling upon the investigating officer to produce the material object back in

court for the purpose of trial . The investigating officers while producing the properties in compliance of such directions should also, while complying with such directions produce the material object along with a report giving the present status and condition of the material object. The various steps in this regard cannot be performed in a vacuum. There should be records discernible in the court in which case only the presumption regarding regularity of official acts can come to the rescue of the prosecution.

The registry shall either communicate a copy of this order or a gist of the same in the form of official memorandum, to all the Magistrates and Sessions Courts for information, future guidance and compliance.

V. Ramkumar, Judge.

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V. RAMKUMAR, J.

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Crl. A. No. 1457 of 2006

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Dated, this the 16th day of January 2007

JUDGMENT